IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of section 331 of the Code of Criminal Procedure Act No 15 of 1979.

Court of Appeal No:

CA/HCC/0036/22

High Court of Chilaw

Case No: HC/42/2002

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Warnakulasuriya Jayantha Lesly Kumar Fernando
2. Aradasivantha Basnayakage Don Jebiyan Ivan Arunasiri Appuhamy
3. Warnakulasuriya Basil Pastas Fernando
4. Warnakulasuriya Prasanna Janaka Fernando
5. Ranasinghe Arachchige Shantha Cajentan Perera
6. Ranasinghe Arachchige Calistus Basil Perera
7. Ranasinghe Arachchige Beat Maximus Perera

ACCUSED

AND NOW BETWEEN

Warnakulasuriya Jayantha Lesly Kumar Fernando

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Tenny Fernando with Asiri Weerakkodi and Thanya Perera for the Accused Appellant
	: Sudarshana de Silva, D.S.G. for the State
Argued on	: 18-09-2023
Written Submissions	: - (By the Accused-Appellant)
	: 18-09-2023 (By the Respondent)
Decided on	: 22-01-2024

Sampath B. Abayakoon, J.

The 1st accused-appellant (hereinafter referred to as the appellant) preferred this appeal on the basis of being aggrieved of his conviction and the sentence by the learned High Court Judge of Chilaw.

The appellant along with six other persons were indicted before the High Court of Chilaw on two counts of trafficking and possession of 1110 grams of Diacetylmorphine, commonly known as Heroin on 20-06-1997, which is a prohibited drug in terms of Poisons Opium and Dangerous Drugs Ordinance as amended by Amendment Act No. 13 of 1984.

During the pendency of the action, the indicted 2nd and the 3rd accused have passed away and the trial against the 4th accused has continued in his absence in terms of section 241 of Code of Criminal Procedure Act.

After trial, the learned High Court Judge of Chilaw found the appellant who was the 1st accused in the case guilty as charged of the judgement dated 29-10-2021. The learned High Court Judge has acquitted the 4th to 7th accused indicted on the basis that the prosecution has failed to prove the charges beyond reasonable doubt against them.

Facts in Brief

PW-01 who was serving as the Superintendent of Police of Chilaw division during the time relevant to this raid has received an information from a known informant a day prior to the raid namely, on the 19th June 1997.

The informant has come to his house and had informed that a Heroin boat belonging to one Basil will reach Iranawila, Thoduwawa Beach tonight. Since the informant was a reliable person, PW-01 has instructed Police Inspector Nimal Fernando who was the Officer in Charge of Mundalama police station to organize and conduct the raid in this regard.

On the following day morning, he has been informed that a successful raid was conducted and five packets of Heroin were found and the suspects were also arrested. Accordingly, PW-01 has instructed the officer who conducted the raid to produce the Heroin found and the suspects to the relevant Magistrate's Court and also to take steps to send the productions for the Government Analyst for a report.

It has been disclosed that although the raid has been conducted in Marawila police area, the PW-01 has assigned this task to the OIC of Mundalama police, as according to him, the OIC Nimal Fernando was a person with experience in conducting raids of this nature.

When this matter was taken up for trial, Police Inspector Nimal Fernando was deceased, and it was PW-03 retired Police Inspector Karunaratne who accompanied Police Inspector Nimal Fernando to conduct the raid has given evidence to substantiate the raid conducted.

He was serving as a Sub-Inspector attached to Mundalama police during the time relevant to the incident. After receiving instructions to conduct the raid, Police Inspector Nimal Fernando has assembled a group of police officers including PW-03 and had divided them into three groups. PW-03 was put in charge of one group and another Sub-Inspector called Mauson was put in charge of the second group, while IP Fernando was in charge of the other group. Among the group, there was only one police officer dressed in police uniform and others were in civilian clothes disguised as fishermen.

The raiding party has left the police station at 8.20 p.m. and had reached the Thoduwawa beach around 11.00 p.m. IP Fernando has directed the group led by SI Mauson to go near the Thoduwawa estuary to stand guard and the other two groups had waited near the Thoduwawa south beach. The day was a day with bright moonlight. While observing the activities around them in a concealed position on the beach, they have observed a large boat without any lights coming near the beach. It has come up to about 200 meters from the beach, and at the

same time they have observed another smaller boat going near the earlier mentioned larger boat and obtaining a sack from the larger boat.

After that, the smaller boat has come ashore near the place where the police party was waiting. They have observed three persons on board, and after the boat reached the beach, the raiding party led by IP Fernando and PW-03 has rushed towards the boat. However, they have managed to apprehend only one person and the other two persons who were in the boat has managed to escape. Although PW-03 and several other officers had pursued the two persons who ran away, they were unable to apprehend them.

On their return, the police team has found a taped fertilizer sack (ගම් වේජ් වලින් ඔතන ලද පොහොර උරයක්) inside the boat. Upon inspection, 5 smaller well sealed parcels have been recovered from inside the sack. PW-03 has identified the appellant as the person they were able to apprehend along with the parcels recovered from the boat.

Although PW-03 has identified the 5th and the 7th accused indicted as the persons who ran away at the time of the detection, it appears that PW-03 has not made a positive identification of them at that instant. It is clear that their names have been revealed as a result of further investigations and they have been apprehended at a later date.

After the detection and the arrest, the police party has taken steps to take the appellant and the parcels to the police station of Chilaw. After conducting a field test, the 5 parcels have shown positive results for Heroin at the Chilaw police station. Thereafter, IP Fernando has taken steps to take the productions along with the appellant to a place called Chandrasiri Bakery in Chilaw - Kurunegala road and weigh the productions using the scales available at the bakery.

Since the witness has not made notes as to the weight obtained, the witness has been permitted to refer to the notes made in that regard by IP Fernando in terms of section 159(2) of Evidence Ordinance. The 5 parcels had contained a total of 2 kilograms and 520 grams of the substance suspected to be Heroin. The

productions have been sealed at the Chilaw police station and handed over to the police reserve after following the due procedure.

The position taken on behalf of the appellant had been that he had nothing to do with the offence, but he was an innocent person arrested without any basis. The witness has refused that contention, stating that the appellant was the only person who was arrested at the time of the detection of the drugs.

The officer who took over the productions from the raiding party led by IP Fernando namely, Police Sergeant 19507 Ekanayake (PW-11), has given evidence in this trial and has confirmed that IP Fernando handed over the productions to him along with 4 suspects while he was on police reserve duty at the Chilaw police station.

During the trial, the parties have admitted the chain of productions from taking charge of the productions by the police reserve and taking the same to the Government Analyst, and also the return of the productions from the Government Analyst department, in terms of section 420 of the Code of Criminal Procedure Act.

Accordingly, the prosecution has called the Government Analyst (PW-19) who conducted investigations to identify the productions sent for analysis to the Government Analyst department. She has taken steps to weigh the 5 parcels which contained a substance suspected to be Heroin under proper lab conditions. The substance contained in the parcel marked J-1 had a weight of 506 grams, the parcel marked J-2 had a substance weighing 502 grams. The parcel marked J-3 had a substance weighing 501 grams, parcel marked J-4 had a substance weighing 500 grams, and the parcel marked J-5 had a substance weighing 502 grams. The Government Analyst has well explained the reasons for the weight difference mentioned in the said parcels forwarded to the Government Analyst stating that when such a quantity is weighed under normal conditions, the weight difference of such a nature can invariably occur due to various factors.

The Government Analyst Report has been marked as P-12 and it has been established that the 5 parcels contained a pure quantity of 1110 grams of Diacetylmorphine or Heroin.

When the appellant and the other accused were called upon for their defence at the conclusion of the prosecution case, the appellant has made a dock statement. He has claimed that while he was sleeping, he heard a noise, and when he went to inquire, he was apprehended and taken away and he is unaware of anything.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for consideration of the Court.

1. The learned High Court Judge was misdirected by failing to consider that the prosecution did not prove the ingredients of the charges against the appellant based on true facts.
2. Without prejudice to the above, learned High Court Judge misdirected that the 1st accused-appellant along with the 5th and the 7th accused had been identified at the time of the detection, yet the 5th and the 7th accused were acquitted which creates a doubt as to the credibility of the evidence.
3. The learned High Court Judge was misdirected by failing to scrutinize the credibility of PW-03 based on principles and established law of the country.

Consideration of the Grounds of Appeal

As the three grounds of appeal are interrelated, I will now proceed to consider the said grounds together.

This is a matter where the police officer who conducted and led a team of police officers in the raid has not given evidence due to the fact of him being deceased at the time the evidence was led before the High Court. Instead, it has been the

PW-03, who was a member of the raiding party, and a person who could speak about the events that took place on that night, who has given evidence.

The evidence of PW-03 had been that, while waiting on the beach expecting the event informed by the informant, they were able to witness a large boat approaching the shore, and when it was about 200 meters away in the sea, another smaller boat approached it and a sack was transferred to the small boat.

The learned Counsel for the appellant has contended that it would not have been possible for a person who is waiting in hiding more than 200 meters away to observe what was happening in the manner stated by the witness.

The explanation of the witness had been that the date of the incident was a Poya day and therefore, they could observe what was taking place with the aid of the moonlight. During the argument of this matter, the learned Deputy Solicitor General (DSG) who represented the respondent brought to the notice of the Court that, in fact, the mentioned 19-06-1997 was a full moon Poya day. The evidence of PW-03 had been not that he identified the persons engaged in the transaction, but was able only to see that a sack being transferred to the smaller boat, which can be possible to see under such light conditions. Hence, I am unable to find a basis to doubt the evidence of PW-03 in the manner he observed what was happening 200 meters away at the sea.

According to the evidence, when the smaller boat reached the beach, the police party could only apprehend the appellant and the other two occupants of the boat has managed to run away before the police party could reach the boat. In my view, this is quite possible since for a police officer who is waiting on the beach in a concealed position will need at least a minute or two to reach a boat coming on shore, which provides an opportunity for a person who is knowingly engaging in an illegal act and also being persons having a sound knowledge of the conditions of the area to escape in the manner mentioned by the witness. This is the very reason why the witness has stated in his evidence that he came to know about the identities of the two persons escaped subsequently. If the

witness was not telling the truth, he could have very well stated that he was able to identify the 5th and the 7th accused before they escaped from being arrested.

It appears from the judgement that one of the reasons for the acquittal of the said accused persons by the learned High Court Judge had been the fact that the said accused had been apprehended some months after the incident, and the failure of the witness to identify them at the time of their escape.

The learned Counsel for the appellant raised the discrepancy as to the weight of the 5 parcels taken over by the police as given in the initial report and when weighed by the Government Analyst as a reason to doubt the credibility of the detection.

The evidence led at the trial clearly establishes that after the detection, the five parcels had been taken to a bakery nearby and weighed with the aid of the scale available at the bakery. No need to say that such a weighing may not produce the exact weight of a content like Heroin. When the 5 parcels were weighed at laboratory conditions using very accurate scales, a difference has been observed as to the weight given in the list of productions sent to the Government Analyst and their actual weight. The Government Analyst has well explained the reasons for the weight difference. This Court is of the view that a difference of such a nature can occur, given the facts and the circumstances relevant to the case under consideration, which would not create any doubt as to the weight of the productions found during the raid.

The evidence of PW-03 had been that these five parcels were recovered inside a fertilizer sack among the fishing nets that were found in the boat. The witness has observed a sack being transferred to the boat from another larger boat about 200 meters away from the beach. When the smaller boat reached the shore, there had been two other occupants other than the appellant and the said two persons has escaped before the police could reach them. It is therefore clear that all three of them including the appellant knew that they were bringing in this consignment of drugs.

There is no basis for any argument that the quantity of drugs found was not in the possession of the appellant and he was unaware of what was being transported.

Another position taken up by the learned Counsel for the appellant was that there was only one witness called by the prosecution to prove the charge against the appellant and the evidence was not good enough to prove the charges beyond reasonable doubt against him.

It is well-settled law that it is not the quantity but the quality that matters in a criminal trial.

The relevant section 134 of the Evidence Ordinance reads thus,

> **134. No particular number of witnesses shall in any case be required for the proof of any fact.**

In this case, it is clear that the Police Inspector who led the raid had not been called as a witness because he was deceased. Under the circumstances, it needs to be considered whether the evidence of PW-03 has provided sufficient proof beyond reasonable doubt that it was the appellant who committed the crime mentioned in the indictment. If the Court can come to such a finding, calling and relying on a single witness to establish the facts does not mean that the prosecution has failed to prove its case.

I do not find merit in the argument that the prosecution has failed to prove the time of the arrest as PW-03 was not there when IP Fernando arrested the appellant. It is clear from the evidence that PW-03 after seeing the two other occupants of the boat fleeing from the scene has pursued them. It was IP Fernando who has arrested the appellant, and when PW-03 returned, the appellant was under police custody.

The evidence led in the trial clearly establishes that this detection has taken place sometime after 11.00 p.m. on 19-06-1997. The evidence also clearly establishes the fact that the raiding party had to wait some hours on the beach

expecting the transaction to take place, which shows that the incident had occurred in the early hours of 20-06-1997.

Under the circumstances, it is my considered view that the exact time of arrest in precise terms going by the clock is not a necessary factor that has to be established in order to prove the charges against the appellant.

During his evidence, PW-03 has been allowed to go through the notes on the raid prepared by IP Fernando only in order to give evidence as to the weights of the 5 parcels recovered during the raid as it was IP Fernando who has taken down notes in that regard.

In terms of section 159(2) of the Evidence Ordinance, such action is permitted and well within the law.

For better understanding, I will now reproduce the relevant section 159 in its totality.

> **159. (1) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.**
>
> **(2) The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.**

Under no circumstances, the evidence of PW-03 in that regard cannot be presumed as hearsay evidence in the manner contended by the learned Counsel for the appellant.

I find that in the judgement, the learned High Court Judge has drawn her judicial mind to all the above factors and the relevant legal provisions before determining that the prosecution has proved the case beyond reasonable doubt. The learned

High Court Judge has also considered the defence taken up by the appellant in order to find whether a reasonable doubt has been created as to the evidence of the prosecution witnesses. I find that the learned High Court Judge has correctly evaluated the appellant's stand before rejecting it with reasons.

The learned High Court Judge has considered the evidence in its totality as should have been in a criminal trial, and has come to her findings with sound reasoning, which I find no reason to disagree.

For the reasons as stated above, I find no merit in any of the grounds of appeal urged by the learned Counsel for the appellant. Accordingly, the appeal is dismissed for want of merit.

The conviction and the sentence dated 29-10-2021 of the learned High Court Judge of Chilaw is affirmed.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal